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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 724

WILLIAM M. ESTEP and DORA ESTEP,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS
and
BRIEF IN SUPPORT THEREOF.

JAMES D. LYNCH,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI.

Your petitioners, William M. Estep and Dora Estep, his wife, respectfully petition this honorable court to issue its Writ of Certiorari to review the judgment of the Supreme Court of the State of Illinois entered on the 6th day of February, 1953, dismissing the appeal of the petitioners (Tr. p. 595).

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Supreme Court of Illinois dismissed the Writ of Error of the petitioners while their cause was pending before the Supreme Court of Illinois on their briefs and the briefs of the State of Illinois. While their cause was thus pending before the Supreme Court of Illinois, the State's Attorney of the State of Illinois came in with a Motion to dismiss the appeal, and in support of this Motion filed Suggestions, stating that the defendants (petitioners herein) were fugitives from the State of Illinois, that they had left the State without leave of court, that their supersedeas bonds had been forfeited by order of court, and that *Scire Facias* proceedings had been commenced and continued. (Tr. p. 575). The defendants thereupon filed Counter Suggestions to the Supreme Court of Illinois, denying that they were fugitives, showing that they had posted supersedeas bonds, duly approved by the court, that the order of court purporting to be a forfeiture order as to their supersedeas appeal bonds, was not a final order but, on the contrary, only a conditional order of court, depending upon determination of the *Scire Facias* proceedings which had been begun but which were still undisposed. The Counter Suggestions of the defendants further stated that the action of the State to dismiss the appeal was premature until final disposition of *Scire Facias* proceedings, that it would offend due process of law for the Supreme Court of Illinois to dismiss the appeal before a final order was had in those proceedings to determine the question whether or not the defendants were fugitives, that the question of whether the defendants were fugitives could only be decided by final disposition of the *Scire Facias*

proceedings or the action of the Governor of the State of Texas where rendition proceedings were then pending and undisposed. (Tr. p. 582). The Supreme Court of Illinois, however, in spite of the fact that the question of whether or not the defendants had been proved fugitives dismissed their appeal. Petitioners in this petition are here contending that the action of the Supreme Court of Illinois offended due process of law by its capricious and arbitrary action in dismissing their appeal.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Jurisdiction of this court is invited under Section 1257 (3) of Title 28 of the United States Code on the basis that the Supreme Court of Illinois, the highest court of the State of Illinois, offended due process of law of the Constitution of the State of Illinois, Par. 2, Article 2 thereof and the 14th Amendment to the Constitution of the United States by dismissing the appeal of the defendants without a showing that the petitioners here were in fact fugitives.

The petitioners brought to the attention of the Supreme Court of Illinois their contention that for that court to dismiss their appeal would violate due process of law, in the Counter Suggestions which they filed to the Supreme Court of Illinois in opposition to the motion of the State of Illinois to dismiss their appeal. (Tr. p. 581). The petitioner showed to the Supreme Court of Illinois that the motion of the State was premature because the *Scire Facias* proceedings brought by the State to forfeit their appeal bonds had not been concluded; that this was required under statute of the State of Illinois before there could be a final order of forfeiture of the appeal bonds; that before such a final order was had, they, the defendants, could not be

deemed to be fugitives. The petitioners herein also informed the Supreme Court of Illinois that there was then pending in the State of Texas rendition proceedings of the State of Illinois against them, before the Governor of Texas, and that since these proceedings also had not been concluded, that there had not been any decision by the Governor of Texas that they were fugitives, and so the Motion of the State to dismiss the appeal was prematurely brought (Tr. p. 584).

In conformity with the rule laid down in *Green Bay* v. *Patten,* 172 U.S. 58, at page 67—which held that it is sufficient if it appears from the record that federal rights be specifically set up or claimed in the State Court—petitioners in their petition for rehearing in the Supreme Court of Illinois to the conditional order of the Supreme Court of Illinois that it would dismiss the Writ of Error, restated their position that the motion of the State to dismiss their appeal was premature and that if allowed, would offend due process of law as being against the Fourteenth Amendment of the United States Constitution and Article 2, Par. 2 of the Illinois Constitution, because neither the *Scire Facias* proceedings to forfeit the appeal bonds in Illinois nor the rendition proceedings in Texas had been concluded; that the defendants had not been adjudicated fugitives anywhere (Tr. p. 592).

The jurisdiction of this court is therefore invoked to review a violation of the due process clauses of the Illinois and the United States Constitutions.

QUESTION PRESENTED.

The only question presented here is: was there a denial of due process of law to the petitioners by the Illinois Supreme Court in dismissing their writ of error on motion of the State while their cause was pending on appeal on their briefs and the briefs of the State of Illinois, without a previous determination of whether or not they were fugitives by disposition of the rendition proceedings in the State of Texas, or by the disposition of *Scire Facias* proceedings in Illinois to forfeit the supersedeas bonds of petitioners?

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

The petitioners (defendants below) were denied due process of law because:

(A) The motion of the State of Illinois to dismiss the writ of error in the Supreme Court of Illinois was premature in that the forfeiture proceedings brought in the lower court of Illinois to forfeit the appeal bonds of the defendants had not been concluded by the completion of the *Scire Facias* proceedings. The forfeiture order relied on in the motion of the State to dismiss was not a final order but a conditional order, which had not been made final by disposition of the *Scire Facias* proceedings begun but not concluded, as required under special statute of the State of Illinois.

(B) The State of Illinois had by entering into a certain stipulation with the petitioners and the Secretary of State of Texas acting in behalf of the Governor of Texas in the rendition proceedings in Texas to hold in abeyance decision by the Governor, to await disposition of their cause pending in the Supreme Court of Illinois on briefs,—waived the State's right to move to dismiss the writ of error of the petitioners in the Supreme Court of Illinois.

The position of the petitioners here is that since there was no adequate showing by the State of Illinois, that there was no real basis for the Supreme Court of Illinois to go on in dismissing petitioners' appeal on the grounds that they were fugitives. The Supreme Court of Illinois, having dismissed petitioners' appeal without a showing that they were in fact fugitives, offended due process of law.

(The abstract of the record of the proceedings of the trial of this cause incorporated in the transcript filed herein is not essential to a consideration of the questions presented by the petition for the writ. The petitioner suggested to the Attorney General of Illinois and the State's Attorney of Cook County of Illinois, attorneys for the Respondent herein that a stipulation be entered into for the purpose of eliminating from the transcript aforesaid the said Abstract of Record, but the aforesaid attorneys refused so to do.)

Prayer.

Wherefore petitioners, William M. Estep and Dora Estep, his wife, pray this honorable court to issue a writ of certiorari to the Supreme Court of Illinois, commanding that court to certify and send to this court for its review and determination, on a day certain to be named therein, the record of proceedings had, to the end that the judgment of the Supreme Court of Illinois may be reviewed and reversed by this court.

Respectfully submitted,

WILLIAM M. ESTEP and
DORA ESTEP,
By: JAMES D. LYNCH,
Counsel for Petitioners.

Of Counsel:
WILLIAM L. CARLIN,
LOUIS A. ROSENTHAL.

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THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Court Below.

The opinion of the Supreme Court of Illinois dismissing the appeal of the petitioners, of which petitioners complain, appears on page 578 of the Transcript of Record and is reported in 413 Ill. 437.

Errors Urged.

The court below, the Supreme Court of Illinois, erred in dismissing the appeal of the petitioners and in not deciding their case on the merits upon the issues joined by the respective briefs of petitioners and the State of Illinois. Petitioners contend that the Supreme Court of Illinois by dismissing their appeal offended due process of law guaranteed by the Constitution of Illinois and the 14th Amendment of the Constitution of the United States.

STATEMENT OF THE CASE.

THE FACTS.

The petitioners (defendants below) filed an appeal to the Supreme Court of Illinois, to review a judgment affirmed by the Appellate Court of Illinois against them, finding them guilty of conspiracy to violate the Medical Practice Act, of obtaining money under false pretenses, and to perpetrate a confidence game. (The defendants' appeal was originally filed to the Supreme Court of Illinois to save constitutional questions raised.)

The petitioners duly filed their briefs to the Supreme Court of Illinois, urging, among other things, that the charges against them were based upon acts which were privileged under the Constitutions of the State of Illinois and of the Federal Government under the Bill of Rights of both as the exercise of freedom of religion; and that there had been a violation of due process of law in the trial of their case by the extreme prejudicial conduct of the State's Attorney in trying the case, and also by virtue of the fact that the attorney for a certain Chicago newspaper was allowed to act as associate counsel for the State at the trial. The State filed answering briefs.

However, before decision could be had on the merits, the State came in with a motion to the Illinois Supreme Court to dismiss the case upon the grounds that the defendants had left the State of Illinois and gone to Texas and were fugitives from the State of Illinois.

The Suggestions of the State, in support of its motion to dismiss the appeal, alleged that the defendants William M. Estep and Dora Estep, his wife, had filed supersedeas appeal bonds of $10,000 and $4,000 respectively, in the Criminal Court of Cook County on December 8, 1950;

that at the March, 1951 Term of the Supreme Court of Illinois, their appeal was transferred to the Appellate Court of Illinois.

The Suggestions of the State went on further to say that on December 5, 1951, while the case was pending and undetermined in the Appellate Court, notice was served upon the sureties of the appeal bonds of the defendants that a hearing would be held in the Criminal Court of Cook County on December 10, 1951, upon a rule to produce the defendants in open court or show cause why their supersedeas appeal bonds should not be forfeited.

The Suggestions stated further that upon showing that the defendants had left the State of Illinois without leave, and were in custody of the law in Lubbock, Texas, an order was entered in the Criminal Court declaring a forfeiture of the supersedeas bonds of the defendants; that *on January* 31, 1952, *Scire Facias proceedings were begun in the Criminal Court of Illinois in connection with the said forfeiture order as to the supersedeas bonds, returnable March* 3, 1952, *at which time the Scire Facias proceedings were continued to May* 2, 1952, *and thereafter continued from time to time to October* 15, 1952 (our italics). (Tr. p. 575).

On February 11, 1952, the Appellate Court of Illinois affirmed the convictions of the defendants. On April 22, 1952 the defendants sued out their writ of error to the Supreme Court of Illinois.

On April 24, 1952, the defendants were arrested in Abilene, Texas, at the request of the Illinois authorities, and released on bond pending rendition proceedings which had been filed. At the hearing before the Governor on June 19, 1952, upon representation by the defendants that they had sued out a writ of error to the Illinois Supreme Court on April 22, 1952, to review the judgment of the

Appellate Court of Illinois, pursuant to stipulation of the parties, the hearing before the Governor of Texas was continued to await determination of the case by the Supreme Court of Illinois.

All the above matters were brought to the attention of the Supreme Court of Illinois in the State's Suggestions (Tr. p. 574).

The defendants filed Counter-Suggestions in opposition to the Motion and Suggestions of the State to dismiss the Appeal in the Illinois Supreme Court. (Tr. p. 581). The gist of the defendants' Counter-Suggestions was that the Motion of the State to dismiss the Appeal was prematurely brought for two reasons:

(1) No final order had ever been entered in either the bond forfeiture action or the rendition proceedings in Texas to establish that the defendants were fugitives. The Illinois Statutes relating to bond forfeiture—Smith-Hurd, Illinois Annotated Statutes (Criminal Code) Chap. 38, Par. 625, provides the procedure in bond forfeiture cases. The procedure, as set forth, is by way of *Scire Facias* proceedings. By their own Suggestions, the State showed that there never was any final disposition of the *Scire Facias* proceedings brought by the State under the Statute, that is to say, the *Scire Facias* proceedings were still *pending* and *undetermined.* (Tr. p. 575). That being the case, there had never been any final determination of the forfeiture proceedings as to the supersedeas bonds, and the defendants, consequently, couldn't possibly have been adjudicated fugitives at the time the Supreme Court of Illinois dismissed the appeal of the petitioners. Accordingly, the Motion of the State to dismiss the appeal was premature and the action of the Supreme Court of Illinois in dismissing the appeal of the de-

fendants would offend due process of law, because they would be dismissing the appeal before any legal determination either by the Governor of Texas or the court in Illinois—where the *Scire Facias* proceedings were still pending—*that the defendants were in fact fugitives.*

2. The Counter Suggestions also pointed out that the Motion of the State to dismiss the appeal was premature in that the State had waived its right to urge a motion to dismiss the appeal, by entering into a stipulation in the rendition proceedings in Texas. This stipulation, referred to in an affidavit attached to the State's Suggestions, was entered into between counsel for the State of Illinois and counsel for the defendants on June 19, 1952—several months before the State made its motion to dismiss the appeal. (Tr. p. 578). It was an agreement that the proceedings before the Governor of Texas be held in abeyance until the disposition of the appeal before the Supreme Court of Illinois, and that the defendants remain under bond in Texas until such disposition of the case. It was further suggested to the Court that this stipulation, entered into months before the motion to dismiss the appeal was presented, was a waiver of the right of the State to make any motion to dismiss the appeal, that the State thereafter had no right to file a motion to dismiss the appeal; that by entering into the stipulation in Texas the State agreed to await the outcome of the appeal in the Illinois Supreme Court *on the merits.*

The Supreme Court of Illinois decided that the Esteps were fugitives and dismissed their appeal on the basis of the Suggestions of the State which on its face showed that they were not fugitives, for the Suggestions of the State showed that the *Scire Facias* proceeding was still pending and that the rendition proceeding before the Governor of Texas was still pending.

ARGUMENT.

I.

The Supreme Court of Illinois By Dismissing the Appeal, Which Was Before It on Briefs, Offended Due Process of Law, For That:

(A) It Had Not Been Legally Established That The Defendants Were Fugitives; (B) The State of Illinois Had Waived Its Right To Dismiss The Appeal By Its Stipulation In Texas To Await Decision Of The Case Before The Illinois Supreme Court.

* * * * * * * *

(A) It Had Not Been Legally Established That The Defendants Were Fugitives.

The record does not show that the defendants were fugitives. The Supreme Court of Illinois had no right to dismiss the appeal without positive proof the defendants were fugitives.

To determine whether or not the defendants were fugitives, the question presents itself: Who is a fugitive? According to the cases, this is a question of fact, in the first instance, to be decided by the Governor of the asylum state where rendition proceedings are filed.

It is the duty of the Governor in the first instance to decide this question, but once he has issued his warrant his decision is reviewable by Habeas Corpus proceedings.

The problem thus therefore usually arises on presentation of a Habeas Corpus petition to the rendition

proceedings. A leading case was *Ex Parte Reggel,* 114 U.S. 642. In that case a Habeas Corpus petition was filed to challenge rendition proceedings brought in the State of Utah. The case held that the question as to whether a man is a fugitive is a question of fact for the governor of the asylum state to determine. According to the case of *Roberts* v. *Reilly* 116 U.S. 80 at 95, there is presented to the governor of the asylum state two propositions to decide: 1. Is the person demanded substantially charged with a crime? This is a question of law. 2. Is the person a fugitive from justice of the demanding state? And this, declared the court, is a question of fact for the governor to decide. The warrant charging the accused with being a fugitive is merely an accusation to be proved in the asylum state before that state surrenders him to the demanding state. It is up to the governor to decide the question of fact, upon such evidence as is adduced before him, as to whether or not the person demanded is in fact a fugitive. The cases hereinbefore cited have been followed in the later cases of *Hogan* v. *O'Neill,* 255 U.S. 52 at 55-6; and *Brewer* v. *Goff,* 138 Fed. 2nd 710 at 712 (1943). In the case of *People* v. *Meyering,* 345 Ill. 598 (1931) it was held that the Governor of the asylum State may determine from the requisition papers or upon independent inquiry whether or not the party to be arrested is in fact a fugitive from justice of the demanding State, and the prisoner himself, after his arrest, is entitled to a hearing on Habeas Corpus to determine that question. To the same effect: *McNichols* v. *Pease,* 207 U.S. 100 at 110 (1907).

In our case, the defendants had appealed their case to the Supreme Court of Illinois, had filed briefs, and the State had filed answering briefs. *There was no suggestion in the State's answering briefs that the Esteps were*

fugitives or that their appeal should be dismissed. Instead, the State proceeded independently by rendition proceedings in Texas. There the Esteps put up bond and brought to the attention of the executive that their appeal was pending in the Illinois Supreme Court on briefs. Then the attorneys for the defendants and the attorney for the State of Illinois and the Secretary of State acting for the Governor stipulated that the matter before the Governor of Texas be held in abeyance until the case was decided by the Illinois Supreme Court (Tr. p. 578). The Governor of Texas thereupon held up a decision in the rendition matter before him awaiting the decision of the Illinois Supreme Court. The decision that he awaited was presumably on the *merits* of the case. This is to be inferred because at the time the stipulation was entered into in Texas there was no motion to dismiss the appeal before the Illinois Supreme Court. The motion to dismiss was presented months after. Therefore it is logical to presume that the parties before the Governor intended that the case before the Supreme Court of Illinois would be heard and decided on the merits, and that no doubt was what the Governor also intended.

On the basis of the cases hereinabove cited, the question as to whether the Esteps are fugitives was a question for the Governor of Texas, as a question of fact to be decided by him, or by disposition of the *Scire Facias* proceedings in the Criminal Court of Illinois. Until it is decided by one of these two methods, the question was open. This was brought to the attention of the Supreme Court of Illinois by the Counter-Suggestions of the defendants to the Suggestions in support of the Motion to Dismiss by the State—that the action of the State was premature and that dismissal of the appeal of the defendants would offend due process of law, but the Court went ahead nonetheless and dismissed the appeal.

2. The Motion of the State to Dismiss the Appeal Was Premature.

The action of the Illinois Supreme Court was premature because the Motion of the State to dismiss the appeal was prematurely brought.

The Motion of the State was prematurely brought because not only had the Governor of Texas not determined the question as to whether or not the defendants were fugitives, but no final order had ever been entered in the bond forfeiture action. The Statute relating to bond forfeiture—Smith-Hurd, Ill. Annotated Statutes (Criminal Code) Chap. 38, Par. 625, provides the procedure in bond forfeiture cases. The procedure as set forth is by way of *Scire Facias.*

The Suggestions in support of the Motion of the State did not show a final judgment in the forfeiture proceeding against the defendants or their sureties on the bond. The so-called order of forfeiture that was entered was only a *conditional* order, which could be made final only by concluding the *Scire Facias* proceeding. The statement is made at page 2 (bottom) of the State's Suggestions, that on January 30, 1952, *Scire Facias* was issued, returnable March 3, 1952, and it was continued to October 15, 1952, and nothing further (Tr. p. 575). There was no showing of any final disposition of the *Scire Facias* proceedings, which is to say, the *Scire Facias* proceedings was still pending and undetermined. That being the case, there was no final, appealable, order upon which the State could base any Motion to dismiss the appeal. The supersedeas bonds of the defendants not having been forfeited, the defendants could not be fugitives.

In the case of *People* v. *Sullivan,* 339 Ill. 146 at 154, the Court stated that a defendant under bond was not at the beck and call of the State's Attorney, and the State's Attorney had no right to have forfeiture of the recognizance merely to question the accused if he be not in default of his bond. The accused in the instant case had made their supersedeas appeal bond and the appeal was pending.

When the State on December 5, 1951 brought proceedings to forfeit the bonds of the defendants, the appeal was pending in the Appellate Court and undetermined. There is a serious question whether the defendants at the time were in violation of the conditions of their bond, but whether they were or not was a matter they had a right to be heard on in the *Scire Facias* action. There was no urgent or special reason for bringing the defendants into court with reference to their appeal bonds except the whim of the State's Attorney.

In the case of *People* v. *Osby,* 254 Ill. App. 545 at 551, the Court declared that the procedure with reference to forfeiture of recognizance under the statute required a "return" of the sheriff as a condition precedent to a proper judgment against the defendant. In the instant case, the affidavit in support of the motion of the State did not show that there was ever any "return" of the sheriff, or that any judgment was ever entered, in the *Scire Facias* proceeding. That being the case, there was no final order, and the motion brought by the State to dismiss the appeal was definitely premature and should have been disallowed.

The defendants had the right under the statute (Chap. 38, Par. 625) to defend against the forfeiture of their bonds by hearing on *Scire Facias* before the lower court and to appeal the judgment of the lower court on the *Scire Facias* proceeding, if unfavorable. To deprive them of this right, as the decision of the Supreme Court of Illinois would do, would be a denial of due process of law.

B. The State of Illinois Waived Its Right to Move to Dismiss the Appeal By Its Stipulation in Texas.

The action of the Illinois Supreme Court in dismissing the appeal was furthermore improper and offended due process of law under the 14th Amendment to the Federal Constitution and Article 2, par. 2 to the Illinois State Constitution, for the reason that one arm of the State had waived the right of the State to urge a motion to dismiss the appeal by its stipulation before the Governor of Texas to await determination of the case on the merits before the Illinois Supreme Court.

We refer the Court to the affidavit of Mr. Cunningham, which is attached to the motion to dismiss. (Tr. 578) In this affidavit there is shown that there was a stipulation by the State of Illinois, acting through its duly authorized officer, of the State's Attorney's Office, and the attorney for the defendants, before the Governor of the State of Texas with, presumably, the knowledge and consent of the Governor of Texas by his acting representative,—that the rendition proceedings pending before the Governor of Texas be held in abeyance there until the pending Writ of Error of the Defendants in Illinois before the Supreme Court, be disposed. It was further stipulated there in Texas that the defendants remain on bond until the disposition of the case in the Supreme Court of Illinois.

By reason thereof, we contend that the State of Illinois waived its right to proceed for dismissal of the Writ of Error, because the stipulation in Texas was in essence an agreement to hold everything in abeyance until the disposition of the appeal here *on its merits.*

The stipulation in Texas was an agreement to await a decision on the merits because all that was pending in the

Supreme Court of Illinois at the time was a case on the briefs, and no motion to dismiss had been filed.

On the date the stipulation was entered into between the State of Illinois and the attorneys for Esteps, and the Secretary of State acting for the Governor, there was no motion pending before the Supreme Court of Illinois to dismiss the Writ of Error. There was, on the contrary, definite briefs by the parties filed before the Supreme Court of Illinois, and the issues were joined. The stipulation entered into by the State of Illinois provided that the matters before the Governor of Texas in the rendition proceedings be continued before him until the issues would be decided by the Supreme Court of Illinois. Can it be said that the State of Illinois could then take contrary action to that agreed upon by it previously in Texas ? It is our contention that the State of Illinois was bound by its stipulation and did not have the right to turn around and file a motion to dismiss the appeal before the Supreme Court of Illinois.

. . . . . .

In the opinion of the Supreme Court of Illinois, the Court cited the case of *Allen* v. *Georgia,* 166 U.S. 138, for the proposition that dismissal of an appeal by a State court upon ground that the defendant is a fugitive, does not constitute denial of due process of law (Tr. 589). That case however, is not applicable here because in that case there was no doubt about the defendant being a fugitive, whereas in our case there was no positive showing that the defendants were fugitives. Justifying further their dismissal of the appeal, the Supreme Court of Illinois, in its opinion, (Tr. 588) cited the case of *McGowan* v. *The People,* 104 Ill. 100, but that case was also not applicable to the case at bar for the same reason, namely: that in the *McGowan*

case there was indisputable proof that the defendant was a fugitive, while in our case the State had not shown that the Esteps were in fact fugitives.

CONCLUSION.

It would appear that all of the proceedings in this case add up to one great judicial mess. The action of the Supreme Court of Illinois in dismissing the appeal of the petitioners was premature in that there was not, at the time of the dismissal of the appeal, any adjudication that the petitioners were fugitives and this was apparent on the face of the Suggestions of the State to dismiss the Appeal.

The petitioners therefore pray that the writ of certiorari be granted.

Respectfully submitted,

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Of Counsel.